

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD CLEVELAND,

Defendant-Appellant.

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UNPUBLISHED

April 19, 2011

No. 296296

Kent Circuit Court

LC No. 09-005370-FH

Before: SERVITTO, P.J., and HOEKSTRA and OWENS, JJ.

PER CURIAM.

After a jury trial, defendant Richard Cleveland was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and felonious assault, MCL 750.82. Defendant appeals as of right. We affirm.

Defendant argues that there was insufficient evidence to support his felonious assault conviction. We disagree.

This Court reviews a sufficiency of the evidence claim de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). We examine the evidence in a light most favorable to the prosecution to determine whether a rational juror could conclude that the essential elements of the crime were proven beyond a reasonable doubt. *Id.* We resolve evidentiary conflicts in favor of the prosecution. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Circumstantial evidence and reasonable inferences arising from such evidence can be satisfactory proof of the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

For defendant to be convicted of felonious assault, the prosecution must have proved the following elements: (1) an assault; (2) with a dangerous weapon; and (3) with intent to injure or to place the victim in reasonable apprehension of an immediate battery. MCL 750.82; *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Moreover, defendant must have had the present or apparent ability to commit a battery. *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993).

In this case, the victim, an eyewitness to defendant's assault of another victim, testified that defendant turned and approached him with a violent look on his face while holding a stick above his head as if he were ready to strike. See *People v Grant*, 211 Mich App 200, 202; 535

NW2d 581 (1995) (stating that a simple assault is an unlawful act that places another in reasonable apprehension of receiving an immediate battery); *People v Knapp*, 34 Mich App 325, 333-334; 191 NW2d 155 (1971) (holding that a broomstick thrown at a victim's head was a dangerous weapon under the felonious assault statute). The victim testified that he was afraid that defendant would hit him with the stick and backed away from defendant. *Grant*, 211 Mich App at 202. Therefore, there was sufficient evidence that defendant used a dangerous weapon.

Defendant also had the present ability to commit a battery. The victim testified that when defendant approached him with the stick, he was “within striking distance” of defendant. Defendant's actions indicated that he intended to place the victim in apprehension of an immediate battery. The victim testified that defendant had a violent look on his face as he approached with a stick raised above his head ready to strike. Moreover, defendant moved toward the victim with the stick raised, not once, but “a few times.” Accordingly, we find that there was sufficient evidence for a rational trier of fact to find that the prosecutor proved all the elements of felonious assault beyond a reasonable doubt.

Next, defendant contends that the trial court erred in not giving an adverse inference instruction to the jury regarding the investigating officers' failure to conduct DNA and fingerprint testing on the stick in defendant's possession at the time of his arrest. We disagree.

We review this unpreserved issue for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764. A trial court must fully and fairly present a case to a jury in a comprehensible manner and must instruct the jury on the law applicable to the case. *People v Waclawski*, 286 Mich App 634, 676; 780 NW2d 321 (2009). Specifically, the trial court must instruct the jury on all the elements of the crimes charged and on any material issues, defenses, and theories for which there is supporting evidence. *Id.* at 678. “Even if somewhat imperfect, instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.*”

A trial court is only required to give an adverse inference instruction where a defendant shows that a prosecutor acted in bad faith in failing to produce evidence. *People v Davis*, 199 Mich App 502, 514-515; 503 NW2d 457 (1993). Here, the DNA and fingerprint evidence simply did not exist. Nothing in the record indicates that the stick taken from defendant was tested for DNA or fingerprints, and the prosecution had no duty to develop evidence for defendant. See *People v Coy*, 258 Mich App 1, 21-22; 669 NW2d 831 (2003). Thus, defendant cannot show that the prosecution acted in bad faith by not preserving, testing, and producing DNA and fingerprint evidence from the stick. *Id.* at 514-515. The trial court was not required to instruct the jury on an issue or theory for which there was no supporting evidence. *Waclawski*, 286 Mich App at 678. There was no plain error affecting defendant's substantial rights.

Finally, defendant's unpreserved claim that trial counsel was ineffective is without merit. Defendant contends that by failing to request that the trial court provide the jury with an adverse inference instruction regarding the absence of DNA and fingerprint evidence, defense counsel was ineffective. As previously discussed, the trial court had no basis for providing the adverse inference instruction. Trial counsel was not ineffective for failing to make a futile objection or argue a meritless position. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004); *People v Wilson*, 252 Mich App 390, 393-394; 652 NW2d 488 (2002).

Affirmed.

/s/ Deborah A. Servitto

/s/ Joel P. Hoekstra

/s/ Donald S. Owens